No. 284.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JAMES D. BYRNES ET AL.,
Appellants,

VS.

J. M. DOUGLASS ET AL.,
Appellees.

Appellants' Reply to Brief for Appellees.

W. E. F. DEAL,
Attorney for Appellants.

Filed June , 1896.

Clerk.

H. S. CROCKER COMPANY, PRINTERS, S. F.

No. 284.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

JAMES D. BYRNES ET AL.,
Appellants,

VS.

J. M. DOUGLASS ET AL.,
Appellees.

APPELLANTS' REPLY TO BRIEF FOR APPELLEES.

It is claimed by counsel for appellees (page 2 of his brief) that appellants had not been using any part of the tunnel in question for many years, and that Douglass was not a tenant of appellants Byrnes and Douglass, and that Douglass was an innocent purchaser of the contact claim without notice. A reference to the record will show that these claims are without support in the evidence. J. F. Angell testified, page 106:

Thomas P. Mack located the contact claim before C. E. Brown located it (page 50). He testified as follows (page 59):

"Q. Did you claim that tunnel when you located that "ground? Did you claim that you acquired any right to "that tunnel when you located this ground. A. No, sir."

Why was it that Mr. Mack did not claim the tunnel? His testimony shows the reason; he did not construct it, and it was at the time of his location in the possession of the Atlantic Consolidated Company, which constructed it.

J. D. Blackburn was there at the time in possession as watchman for the company, see his testimony, page 63:

"I swore in the District Court that I knew Yule, the "superintendent of the Atlantic Consolidated Mining "Company, and that he worked the Atlantic claim "through the other tunnels and through the lower "tunnel too, and it is true. That was in 1878."

He further testified that he went into possession of the Atlantic Consolidated Mine and this very tunnel as watchman for the Atlantic Consolidated Company on the first day of February, 1887, and was in such possession until he commenced his suit to recover his wages as watchman on September 2, 1890, see his cross-examination, pages 68, 69, 70.

The witness testified that the company did not own this tunnel for the reason that while he was in possession as watchman for the owners a location was made of the land where the mouth and part of the tunnel are situated in which he was interested. He is under

the same delusion as the appellant Douglass, that persons occupying positions of trust, such as watchman and tenants, can acquire interests in the trust property adverse to the owners. Mr. Blackburn further testified, pages 101, 102:

"I was the plaintiff in the suit of J. D. Blackburn "against the Atlantic Consolidated Mining Company, "which was tried in the District Court of the State of "Nevada, first judicial district, Storey county, and re- "covered judgment for the amount claimed. Between "October 28, 1887 and September 1, 1890, I performed "certain services for the Atlantic Consolidated Min- "ing Company, as watchman, taking care of their "property. The company had run the lower tunnel. "Bob Buzan worked in it in 1875. When I saw "Buzan working there, the tunnel had been run to "a distance of over three hundred feet, and he run it "along a distance until he cut the ledge. It was "the same named company that I was watchman for "that run the tunnel, but different men became inter- "ested in it. The parties I worked for as watchman "became possessed of the lower tunnel as successors "in interest of the parties who run the tunnel. When "I went there as watchman, the first day of February, "1887, I took possession of the lower tunnel and "their other property until I commenced suit against "them for my wages, the second day of September, "1890. I worked for them as foreman and superin- "tendent at first, and worked in that capacity until "they closed the mine, and then I was left in charge "as watchman. I remained as watchman until Sep- "tember 2, 1890."

Thomas P. Mack located the contact claim before C. E. Brown located it (page 50). He testified as follows (page 59):

"Q. Did you claim that tunnel when you located that " ground? Did you claim that you acquired any right to " that tunnel when you located this ground. A. No, sir."

Why was it that Mr. Mack did not claim the tunnel? His testimony shows the reason; he did not construct it, and it was at the time of his location in the possession of the Atlantic Consolidated Company, which constructed it.

J. D. Blackburn was there at the time in possession as watchman for the company, see his testimony, page 63:

"I swore in the District Court that I knew Yule, the " superintendent of the Atlantic Consolidated Mining " Company, and that he worked the Atlantic claim " through the other tunnels and through the lower " tunnel too, and it is true. That was in 1878."

He further testified that he went into possession of the Atlantic Consolidated Mine and this very tunnel as watchman for the Atlantic Consolidated Company on the first day of February, 1887, and was in such possession until he commenced his suit to recover his wages as watchman on September 2, 1890, see his cross-examination, pages 68, 69, 70.

The witness testified that the company did not own this tunnel for the reason that while he was in possession as watchman for the owners a location was made of the land where the mouth and part of the tunnel are situated in which he was interested. He is under

the same delusion as the appellant Douglass, that persons occupying positions of trust, such as watchman and tenants, can acquire interests in the trust property adverse to the owners. Mr. Blackburn further testified, pages 101, 102 :

" I was the plaintiff in the suit of J. D. Blackburn " against the Atlantic Consolidated Mining Company, " which was tried in the District Court of the State of " Nevada, first judicial district, Storey county, and re- " covered judgment for the amount claimed. Between " October 28, 1887 and September 1, 1890, I performed " certain services for the Atlantic Consolidated Min- " ing Company, as watchman, taking care of their " property. The company had run the lower tunnel. " Bob Buzan worked in it in 1875. When I saw " Buzan working there, the tunnel had been run to " a distance of over three hundred feet, and he run it " along a distance until he cut the ledge. It was " the same named company that I was watchman for " that run the tunnel, but different men became inter- " ested in it. The parties I worked for as watchman " became possessed of the lower tunnel as successors " in interest of the parties who run the tunnel. When " I went there as watchman, the first day of February, " 1887, I took possession of the lower tunnel and " their other property until I commenced suit against " them for my wages, the second day of September, " 1890. I worked for them as foreman and superin- " tendent at first, and worked in that capacity until " they closed the mine, and then I was left in charge " as watchman. I remained as watchman until Sep- " tember 2, 1890."

On cross-examination, Mr. Blackburn testified :

" I didn't do any work as watchman. It was some " years prior to 1890 that work had been done on the " Cadiz ground. I think when Brown located the " Cadiz ground, in 1890, that it was vacant ground " subject to relocation by reason of the fact that no work " had been done for several years. The tunnel was a " good tunnel for about 430 feet in 1890. I measured " it to the point where it was caved at that time " with Brown. The tunnel was run about 300 feet " when I went to Silver city in 1872. I understood " that it had been run by the Atlantic Company. One " of the original locators of the ground told me the " company run it. It was about 1882 when the cor- " poration last done any work on the tunnel."

The Court will see from the record that Mr. Blackburn was in possession of this very tunnel, together with all property of the Atlantic Consolidated Mining Company, from February, 1887, to September 2, 1890, and that the title of appellants Byrnes and Mulville to the property was by virtue of a judgment secured against the company by Blackburn on the 24th day of June, 1891 (page 43), and execution and sale. The Sheriff's deed to James D. Byrnes and J. J. Grene was made February 16, 1892 (p. 44.) The judgment was rendered for Blackburn's wages as watchman.

On the 22d day of March, 1890, W. H. Stanley entered into possession of the Atlantic Consolidated Mine and this tunnel under the lease marked Exhibit A to answer (pp. 23–25). It will be seen that Stanley took possession while Blackburn was acting as watchman. Stanley testified (pages 95-98): "I am lessee

" named in the lease which has been introduced in evi-
" dence in this case. Under this lease I took possession
" of the ground and of the tunnels. There were three
" tunnels leased with the ground. I got the Atlantic and
" Cadiz ground. That was in the spring of 1890 (p. 95).
" I took possession of the lower tunnel under the lease
" which I had of the Atlantic ground and its appurte-
" nances. The first thing I did after getting the lease I
" took possession of the lower tunnel,—the tunnel in con-
" troversy here—as I expected to do the greatest part of
" my work through this tunnel (page 96)."

On the 16th day of September, 1891, Stanley assigned his lease to Frank Muhlbeyer (pages 44 and 45) and at the same time conveyed his interest in the Contact mine to him which he had acquired from C. E. Brown, to avoid any trouble with Brown and to enjoy the benefit of his lease (pp. 48, 49; Stanley's testimony pages 93 and 94).

Stanley testified (page 97): " Then Muhlbeyer came
" to me and represented to me he wanted to work that
" ground under that lease. I delivered possession to
" Muhlbeyer according to the terms of the lease. * *
" I put Muhlbeyer into possession of the very same
" property, * * * and he stepped into my shoes so
" far as the lease was concerned."

As soon as Muhlbeyer got the assignment of the lease and the deed from Stanley he assigned the lease and conveyed the Contact ground to appellant Douglass, who took possession under the lease and deed. Stanley's testimony (page 97): " After Douglass got the assign-
" ment and the conveyance from Muhlbeyer he opened

" the mine and extracted ore and extended the lower " tunnel beyond the point where I penetrated."

See page 45 as to the assignment from Muhlbeyer to Douglass; and as to the deed of the contact claim from Muhlbeyer to Douglass, see page 49.

On the 16th day of September, 1891, Douglass is in possession of the Contact ground—of the Atlantic mine and of this tunnel, as tenant of the Atlantic Consolidated Mining Company.

He took the titles just as Stanley held them and was bound to know exactly what he got from his assignee. Muhlbeyer was the agent of Douglass in making the purchase of the lease and the contract claim. He was employed by Douglass for that very purpose.

Mr. Douglass testified, page 77:

" I employed Muhlbeyer to buy the Contact and get " the assignment for me. I furnished the money that " was paid for it. I employed Mr. Huffaker to draw the " papers and to attend to the matter for me."

At the time when Mr. Douglass took this deed and assignment he knew that C. J. Milievich, one of the grantees, in the deed of the Contact ground made by C. E. Brown to Stanley and Milievich (see deed, pages 46, 47 and 48) held the interest in the contract so acquired for Andrew Charles.

Mr. Douglass so testified. He says (p. 77): " Andrew " Charles claimed that the Milievich interest in the " the contact claim was for him."

Stanley says (p 93): " Andrew Charles and I owned equal interests in the lease."

Douglass says (page 79): " I might have told " Charles before I got the tunnel what I wanted it for,

" and he helped me to get it. I might have said to
" Charles that I wanted it for the purpose of running a
" tunnel in that ground as he owned an interest in the
" Contact. Charles first worked in the Atlantic ground
" under a lease I got from Stanley . . . .
" I took the lease of the Atlantic ground for the reason
" that Charles wanted to work the ground. I didn't
" want the lease for myself, but I took it myself and
" told Charles he could have that lease and work the
" ground under it."

Can there be any possible question under this testimony as to the fact that Douglass did take possession of this mine and this tunnel under his lease? As was said by the Supreme Court of Nevada in *Byrnes* vs. *Douglass*, 42 Pacific Reporter, p. 799: "Whenever " the mine was conveyed the possession of the tunnel " went with it."

When Stanley went into possession of the Atlantic mine it consisted of the Atlantic and Cadiz mines—Brown having relocated the Cadiz mine under the name of the Contact for himself and J. D. Blackburn, the watchman of the property—it still remained the property of the Atlantic Consolidated Company, as neither Brown nor Blackburn could acquire such a joint or other title against the company. Stanley and Miliewich or Charles then took title to the Contact from Brown to enjoy unmolested the lease which Stanley and Charles owned together, and finally through the conveyances introduced in evidence Douglass and Charles got possession exactly as Stanley and Charles held the property.

Douglass knew in law whatever his agent knew. Stanley explained the circumstances in the presence of

Muhlbeyer and the attorney for Mr. Douglass. He testified, page 93:

"At the time of the assignment of this lease to "Muhlbeyer, I informed Mr. Huffaker that I owned "one-half of that lease and that Andrew Charles owned "the other half. I informed him of the same fact "at the time of the conveyance of the contact. I "expressed a doubt of my right to convey the Contact "claim at all, and Mr. Huffaker said I could convey it, "and he would stand between me and harm in this "respect, and so I conveyed."

No question of abandonment is in this case. Abandonment cannot take place of property held in fee simple. If the tunnel was part of the mine, title to it could only be transferred by the deed of the owner or by an adverse possession for the statutory time, which raises the presumption of a grant.

Ferris vs. *Coover*.

Ferris vs. *Chapman*, 10 Cal., 589.

The Commissioners, in the sixth finding, award appellants Byrnes and Mulville $1,021.95 for the value of the right of way through the Atlantic Consolidated mine. They could only have done this for the reason that appellants' predecessors in interest and grantors constructed this tunnel through their mine and this was the part of the tunnel that was caved in. All of the witnesses testify that the first two hundred or three hundred feet of the tunnel was in solid rock and that no repairs were necessary to that part of the tunnel.

W. H. Naleigh, page 124: "The first two hundred and "fifty feet were repaired for forty cents a foot. The

" repairs that amounted to anything, testified to by Mr. " Douglass, were made beyond the first two hundred " feet " (see Stanley's testimony, p. 98).

Appellants Byrnes and Mulville took the title to the Atlantic Consolidated mine, including the tunnels, subject to the lease, and, upon the expiration of the lease, they were entitled to receive the property leased just as it was received by the lessee, wear and reasonable use thereof excepted. This was one of the covenants of the lease. (See lease, page 24.)

McCune vs. *Montgomery*, 9 Cal., 576.

The rule that a tenant cannot dispute a landlord's title applies just as fully between the vendee of the landlord and tenant as between the original landlord and tenant.

A. and E. Encyclop. of Law, Vol. 12; Title Landlord and Tenant, pp. 701–707.

Section 2323 and Section 2324 of the Revised Statutes of the United States relate to entirely different matters and not, as counsel for appellee claims, to the same matter. Under Section 2323, a tunnel location can be made for the purpose of discovering of what are known as blind ledges. These tunnel locations can only be made upon vacant public land. After a vein is discovered by means of the tunnel, the locator must locate the vein so discovered as provided in Section 2324.

Rico Aspen Com. Co. vs. *Enterprise Co.*, 53 Fed. R., 322.

Section 2324 as amended by the Act of Feb. 11, 1875, applies to claims that have been discovered, located and

owned. In such cases the act provides that work done in a tunnel run for the purpose of developing such discovered, located and owned lode shall be considered as expended on the lode.

Book vs. *Justice Mining Co.*, 58 Fed. R., 117.

The rule for arriving at the compensation to be paid for land taken under the act in question as stated by counsel for appellees was to this effect: That the market value of the land before the taking should be ascertained and then the market value of what was not taken should then be ascertained, and, if the market value of what was not taken is enhanced by reason of the benefits caused by the taking of a part, the difference is the compensation to be paid. Such a rule will not give the just compensation required by law to be paid. It leaves out of the question entirely the damages sustained by the destruction of buildings, which often takes place, as well as the destruction of growing trees and minerals that may be taken and destroyed in putting to use the right of way.

Virginia and Truckee R. R. Co. vs. *Henry*, 8 Nev., 171; 34 New Hampshire, 284.

Sutherland on Damages, Vol. III., Secs. 1051 to 1090, Section 1068.

Finn vs. *Providence Gas and Water Company*, 96 Pa. St., p. 631.

Marsden vs. *Cambridge*, 114 Mass., 490.

Hartshorn vs. *Worcester*, 113 Mass., 111.

In this case the appellants were entitled to the full value of the completed tunnel, 648½ feet long, together with all damages they sustained by reason of being deprived of the best means they had of working their own mines, and also the value of all ore destroyed or thrown away in the extension of the tunnel.

See authorities above cited and *Colusa Co.* vs. *Hudson*, 85 Cal., 633.

All property has some value. The taking of private property for a public use carries with it the payment of something for the taking, just as the invasion of a private right of itself imports damages.

The other questions involved in this case are not discussed in this brief for the reason that they have been fully presented in the brief on file and in the oral argument.

Respectfully submitted,

W. E. F. DEAL,
Attorney for Appellants.